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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

DORAN WALLACE LINCOLN, JR.,

Defendant and Appellant.

A148277

(Mendocino County
Super. Ct. No. SCUK-CRCR-15-83851)

In this appeal, appellant challenges the trial court's decision to sentence him to state prison instead of granting probation. We have reviewed the proceedings in this case and determine the trial court did not abuse its discretion in the sentence imposed. We therefore affirm.

STATEMENT OF THE CASE

On December 23, 2015, the District Attorney of Mendocino County filed an information alleging appellant committed a violation of Penal Code¹ section 288, subdivision (b)(1), lewd and lascivious acts with a child under the age of 14 years with force (count 1); and three counts of section 288, subdivision (a), lewd and lascivious acts with a child under the age of 14 (counts 2–4). On February 25, 2016, pursuant to a plea bargain, appellant pleaded guilty to counts 2, 3, and 4. It was an open plea. He acknowledged the maximum and the minimum sentences available to the trial court, the

¹ Unless otherwise stated, all statutory references herein are to the California Penal Code.

possibility of probation, and affirmed the court made no promises on what the sentence would be.

On May 5, 2016, the court sentenced appellant to six years on count 2 and imposed two concurrent terms of six years each for the guilty pleas on counts 3 and 4. On May 6, 2015, appellant filed his notice of appeal.

STATEMENT OF FACTS

In this case, the parties stipulated to a factual basis for appellant's guilty pleas in the case. The stipulation was: "Between September 11th and September 14th, 2015, in the County of Mendocino, [appellant] acted lewdly and lasciviously with Jane Doe who was under the age of 14 by fondling her breast area. . . . [B]etween September 18th and September 21st of 2015, also in the County of Mendocino, again [appellant] act[ed] lewdly and lasciviously with Jane Doe, a minor victim who is actually age 11. Again by fondling her breasts. And as to Count 4, between October 15th, 2015, and November 8th, 2015, in the County of Mendocino, again [appellant] act[ed] lewdly and lasciviously with Jane Doe, a minor under the age of 14, age 11, again by fondling her breasts."

DISCUSSION

In this matter, appellant argues the trial court abused its discretion when it denied him probation and sentenced him to state prison. He argues the court was confused regarding the circumstances of the case, failed to apply the proper sentencing factors, and did not consider the section 288.1 report. We find no error by the trial court in its election of a proper sentence. In this matter, the court imposed a prison sentence because it determined the appellant exercised criminal sophistication, the minor was very young, appellant subverted the family trust, and the criminal behavior imposed significant impact on the victim.

Appellant in this case is the grandfather of the victim, Jane Doe. His conduct covered a period of three months. Here, appellant has admitted the groping of Jane Doe's

breasts during the period on at least three occasions. He was either 71 or 72 when he did the several acts alleged.

The section 288.1 report was submitted to the court on March 10, 2016. Dr. Kevin Kelly wrote the report. When Dr. Kelly spoke with appellant, the appellant contended the victim encouraged his sexual behavior and his conduct was logical based on her suggestions. Dr. Kelly found appellant's explanation and justification for his conduct consistent with adult offenders facing such accusations. Blaming the victim for the accused's circumstances and unusual explanation for the conduct is characteristic of many sexual offenders after they are caught. The report found appellant suffered no drug or alcohol addictions and the particular incidents alleged in the information did not sustain a finding of pedophilia or other paraphilia. Kelly concluded appellant was amenable to therapy and counseling for sexual offenders and should realize a fair to good chance of improvement with treatment. In summary, the therapist concluded probation and counseling would be a viable alternative to incarceration.

Alternatively, the adult probation department recommended probation be denied and a seven-year prison sentence imposed. The term was reached based on the mitigated term of three years for count 2, along with consecutive sentence of one-third the midterm of six years for the remaining counts. The probation report noted appellant "slowly introduced inappropriate comments and advances in a way that made the victim unaware the abuse was actually occurring until it was too late." He provided the child with gifts to obtain favors from the minor and also isolated her from other members of the family. As a result of the grandfather's conduct, the family dynamic has been "forever alter[ed]" especially with the victim, and the family sought a prison sentence.

The probation report went on to discuss the factors in aggravation and mitigation in the case. The report carefully and appropriately assessed the factors supporting a denial of probation as well as a reason for concluding appellant was a candidate for probation and outpatient treatment. The probation officer concluded: "Based on the

circumstances of this case, and considering the victim and her family's position, it is recommended probation be denied, and [appellant] be sentenced to state prison. However, when considering the circumstances in aggravation compared to those in mitigation, and considering [appellant's] age, the mitigated term appears to be appropriate."

Appellant and his counsel submitted a pleading asking for probation, explaining why he was a good candidate for such a sentence.

At the sentencing hearing, the trial court stated she had reviewed all reports in the case: the probation report and recommendation, the section 288.1 report from Dr. Kelly, and appellant's petition for probation. In reaching her conclusion denying probation, the court indicated "the victim in this case was extremely young, [appellant] possessed a position of trust" based on his "familial relationship." Furthermore, the court noted, "there's other information in the probation report concerning the impact that this offense has had on the whole family" While acknowledging the appellant is elderly and with essentially no prior record, the court concluded, "[T]he facts as I understand them to be as outlined in the probation report, had a feature to them or an element to them of enticing or luring the victim with promises and gifts and things like that. So I am going to deny probation at this time."

Generally speaking, probation is a sentencing option applicable to convicted persons who pose minimal risk to public safety if released. (§ 1203.1; *People v. Welch* (1993) 5 Cal.4th 228, 233.) A sentencing court enjoys broad discretion in deciding who is eligible for probation. (§ 1203, subd. (b)(1).) Any defendant is eligible for probation unless he or she is included in categories restricting the availability of probation. Certain crimes prohibit a sentence of probation (see §§ 1203.06-1203.09). Others limit judicial authority at sentencing unless unusual circumstances are present. (§ 1203, subd. (e).) Some penal statutes require particular conditions be satisfied before a probationary sentence can be imposed. (§ 1203.066, subd. (d).)

In our case, appellant's convictions deal with section 288. Under section 1203.066, subdivision (d)(1), there is a presumptive prohibition against probation for those convicted of section 288 without particular conditions being satisfied. This presumption imposes on the sentencing court the duty to consider narrowly the rare or unusual case for probation so that the statutory restrictions on probation are limited. (*People v. Superior Court (Dorsey)* (1996) 50 Cal.App.4th 1216, 1229.) If the trial court finds the particular case is "unusual" as defined by California Rules of Court,² rule 4.413, then the court determines whether probation is appropriate under rule 4.414. (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 830.)

The factors detailed in rule 4.414 derive from the crime and the defendant's background. When considering the crime, the court looks to the circumstances and seriousness of the criminal acts of the instant case as opposed to the same crime generally. These include the vulnerability of the victim; the infliction of emotional and physical harm; any unusual circumstances, such as great provocation; the level of sophistication and professionalism in the crime; and whether the accused took advantage of trust or confidence in his relationship with the victim. (Rule 4.414(a).) Factors relevant in assessing the accused include his prior record; the pattern of behavior in criminal conduct; the effect of incarceration on the defendant and his dependents; the degree of remorse; the likelihood the failure to imprison will allow the accused to be a danger to others. (Rule 4.414(b).)

This court will generally not disturb a sentencing determination unless appellant demonstrates the trial court exercised its discretion in an arbitrary or capricious fashion. (*People v. Edwards* (1976) 18 Cal.3d 796, 807.) The trial judge is not required to state her reasons for denying probation so long as she properly articulates why she believes a prison sentence is appropriate. (*People v. Martinez* (1985) 175 Cal.App.3d 881, 896.)

² All references to rules are to the California Rules of Court.

We have reviewed the sentencing hearings in this matter. The hearings took place on April 19, 2016 and May 5, 2016. The parties were given proper opportunity to indicate what the fair sentence should be. The court indicated she had considered all relevant documents submitted by Dr. Kelly, probation, and appellant. Candidly, the court indicated the key mitigating factors of appellant's age and lack of prior record as matters she considered in sentencing.

Yet the victim here was 11 years old. She was especially vulnerable to her appellant grandfather. (Rule 4.414(a)(3).) Her effort to resist the aggression by appellant was to wear a sports bra, believing it would make it difficult for appellant to remove the item as he tried to caress her breasts. This was not sufficient.

Furthermore, the court was concerned with the breach of trust. He was her grandfather. Over a three-month period, the parents of Jane Doe entrusted appellant with her care in his home. He told Jane Doe not to tell anyone about his conduct. If she did, he told her he would indicate she engaged in improper touching first.

Jane Doe's mother also indicated the conduct had seriously injured the family unit, causing parent and child to engage in distrust and division.

Appellant argues the trial court was "confused" during features of the sentencing in this matter. He points to the reference to "victims," though Jane Doe was the only victim in the case; and the court's observation Jane Doe was "extremely young." First of all, the reference to "victims" is a singular instance and does not support the claim of confusion of facts by the court. The court objected to the allegation she was confused on the number of victims in the case. Also, labeling Jane Doe as "extremely young" is not necessarily incorrect, both as to her age of 11, and in comparison to her 72-year-old grandfather, 61 years her senior. Her youth underscored her extreme vulnerability. The bottom line is, on this record, any misstatements by the trial court are without significance. Objectively, the court knew what her sentencing alternatives were in this *specific* case and did not abuse her discretion in exercising her choice.

We also reject appellant's contention the trial court did not consider the section 288.1 report prepared by Dr. Kelly. The court expressly stated she had reviewed the report during sentencing. She was not obligated to state in detail its role in her sentencing judgment. (*People v. Label* (1974) 43 Cal.App.3d 766, 776.)

We further observe there is a statutory presumption the trial court here exercised her duties appropriately. (Evid. Code, § 664; *People v. Moran* (1970) 1 Cal.3d 755, 762.) In this case, appellant presents no affirmative evidence the trial court applied improper principles in deciding whether to grant probation or sentence appellant to state prison. Without more from appellant, we shall presume the trial court acted properly here.

DISPOSITION

Having reviewed the sentencing process followed in this case and finding no abuse of discretion by the trial court in the sentence imposed, we affirm the judgment.

DONDERO, J.

We concur:

HUMES, P. J.

BANKE, J.

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